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# Gerdon v. State Appellant's Reply Brief Dckt. 39300

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**JAMES GERDON,**

**Petitioner-Appellant,**

**No. 39300**

**V.**

**STATE OF IDAHO,**

REPLY BRIEF

**Respondent.**

## REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

**HONORABLE G. RICHARD BEVAN**  
District Judge

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$$C_{10}H_8 \rightarrow C_8H_6$$

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## I. TABLE OF AUTHORITIES

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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

James Gerdon appeals from the district court's memorandum opinion dated September 30, 2011 dismissing his amended successive petition for post conviction relief (R., pp. 311-322), and the district court's judgment of dismissal, filed October 7, 2011 (R., p. 324). Mr. Gerdon asserts that the district court erred by dismissing his petition for post-conviction relief and by failing to reconsider its dismissal.

### **B. Statement of the Facts & Course of Proceedings**

Mr. Gerdon had pleaded guilty to sexual abuse of a minor, lewd conduct with a minor and attempted lewd conduct with a minor on November 10, 2003. He was sentenced thereon to a total of fifteen years fixed and fifteen years indeterminate, all sentences to run concurrently. (R. 312). Mr. Gerdon filed an appeal, but the case was affirmed on May 19, 2005. (R. 312).

On October 20, 2004, Mr. Gerdon filed his first petition for post-conviction relief. It was summarily dismissed on June 28, 2006. (R. 312). There was apparently confusion as to when Mr. Gerdon received notice of the dismissal, with Mr. Gerdon writing to the district judge to inquire regarding the status of his case. The district judge sent him a copy of the memorandum opinion, and Mr. Gerdon wrote back requesting an affidavit for purposes of appeal. (R. 318). Mr. Gerdon then filed an untimely appeal that was dismissed due to the untimeliness. (R. 318).

Mr. Gerdon filed his second petition for post-conviction relief claiming ineffective assistance of counsel during his first post-conviction on April 21, 2008. This petition

was dismissed on May 6, 2009. (R. 313, 318). Mr. Gerdon appealed, but voluntarily dismissed his appeal. (R. 313).

On June 21, 2010, Mr. Gerdon filed the instant petition for post-conviction relief with, along with a supporting affidavit, alleging ineffective assistance of prior post-conviction counsel for failure to assert ineffective assistance of trial counsel for failure to file a motion to suppress and failing to object to restitution. (R. 313-314).

Throughout Mr. Gerdon's contentions, he maintained that he did not have effective communication with his attorneys and that therefore he had ineffective assistance of counsel at the trial stage, appellate stage, and during his post-convictions. (See, eg., Tr. pg. 51, Line 1 - pg. 68, Line 7). Because he was unable to effectively communicate with his attorneys, and as a result, his arguments were never presented properly, Mr. Gerdon argued that his successive post-conviction petition should be allowed. *Id.*

Ultimately, the District Court denied the motion to reconsider and dismissed the petition for post-conviction relief in its memorandum decision. (R. 311-322),, and entered an order dismissing the petition for post-conviction relief. (R. 324).

Mr. Gerdon timely filed his appeal. (R 326-328).

## **II. RESTATED ISSUE PRESENTED ON APPEAL**

- A. Did the district court err when it dismissed Mr. Gerdon's Amended Successive Petition for Post-Conviction Relief as untimely and as a successive petition, because the doctrine of equitable tolling should have applied to allow the Amended Successive Petition?**

### III. ARGUMENT

#### A.

The District Court Erred when it dismissed Mr. Gerdon's Amended Successive Petition for Post-Conviction Relief as untimely and as a successive petition, because the doctrine of equitable tolling should have applied to allow the Amended Successive Petition.

As stated in Appellant's opening brief, a petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

A claim for post-conviction relief must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever proceeding is later. I.C. § 19-4902. Successive petitions are impermissible "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908.

Also as noted in the opening brief, Section 19-4908 sets forth no fixed time within which successive petitions may be filed, however, the "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is considered by the courts on a case-by-case basis. *Id.*

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Further, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. See *id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. See *Workman*, 144 Idaho at 522, 164 P.3d at 802.

1. Mr. Gerdon contends that his Petition should have been allowed under I.C. 19-4901.

Mr. Gerdon's contends that the district court erred by failing to allow his petition under I.C. § 14-4901, and *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). Mr. Gerdon argues that he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability of the finding of guilt and could not have, in the exercise of due diligence, been raised earlier, allowing a successive petition under I.C. § 19-4901. He contends that the ineffectiveness of his attorney at his first post-conviction prevented him from properly presenting his arguments. *Id.* Also importantly, Mr. Gerdon has argued that because he did not receive his legal mail, he was deprived of reasonable access to the courts such that he



was hindered and/or prevented from filing a timely petition, and from properly pursuing it via his attorneys. See, eg., *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

As stated above, throughout Mr. Gerdon's case, he maintained that he did not have effective communication with his attorneys and that therefore he had ineffective assistance of counsel at the trial stage, appellate stage, and during his post-convictions. (Tr. pg. 51, Line 1 - pg. 68, Line 7. Tr. pg. 99, Line 13, - pg. 109, Line 24). Particularly, he did not have effective phone or mail communication when he was in custody out of state during his initial appeal period and first and second post-convictions and even into February, 2011 after he filed the post-conviction that is the basis for this appeal. (Tr. pg. 103, Line 16 - pg. 107, Line 15). Because he was unable to effectively communicate with his attorneys, and because thereby his arguments were never presented properly, Mr. Gerdon argued that his successive post-conviction petition should be allowed. Mr. Gerdon also specifically tendered exhibits into evidence at his evidentiary hearing that demonstrated he had trouble with his legal mail, (Tr. pg. 110, Line 22 - pg. 126, Line 21, Exhibits 1 - 24), and that as a result, he could not communicate effectively with his attorneys, and that therefore, his points were not adequately presented as discussed in *Charboneau* and *Baker*. Because they were not adequately presented, including the claim regarding the failure to file and properly argue the motion to suppress. Mr.

Gerdon contends that he is not barred by *res judicata* from pursuing a claim of ineffective assistance of counsel on that issue because his first post-conviction attorney did not communicate with him, and he was not able to properly present the argument.

Further, Mr. Gerdon presented testimony that he did not have access to Idaho legal authority as he was held out of state, and that for that additional reason, his arguments were not presented adequately previously. (Tr. pg. 127, Lines 4 - 18).

The district court, in denying relief to Mr. Gerdon, noted that "equitable tolling" as discussed by *Charboneau*, has been applied only in cases of mental disease and/or psychotropic medication, or when a petitioner was incarcerated out of state on an in-state conviction without legal representation or access to Idaho legal materials. (R. 316). Mr. Gerdon has contended that he has submitted evidence of being deprived to effective access to the courts due to his lack of communication with his attorneys, which led directly to the failure of his first post-conviction attorney to pursue the search warrant issue, and/or pursue the restitution issue. First, due to being housed out of state, and/or due to the communication issues he documented, he did not have access to legal representation in any effective sense. Second, he did not have access to Idaho legal materials. The record before the district court showed even that there was no evidence Mr. Gerdon received notice of the June 28, 2006 decision until after 42 days had passed. Therefore, Mr. Gerdon's problems with his legal mail cost him the ability to file a timely appeal. This is one more example of how Mr. Gerdon did not have effective access to the courts.

It is Mr. Gerdon's position that the problems with communication with the courts


and his attorneys caused him to be untimely in filing his appeal from his first post-conviction.

Therefore, it is Mr. Gerdon's contention that his third post-conviction petition should have been allowed, based on the claim of ineffective assistance of his prior post-conviction counsel, and due to that ineffective representation, the conduct of his trial and appellate counsel.

#### **IV. CONCLUSION**

Based on the above, Mr. Gerdon respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.


DATED this 7 day of January, 2013.

  
\_\_\_\_\_  
STEPHEN D. THOMPSON  
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7 day of January, 2013, I served a true and correct copy of the foregoing REPLY BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

Kenneth K. Jorgensen  
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\_\_\_\_\_  
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